Supreme Court, U. S.
FILED
DEC 10 1979
MICHAEL RODAK, JR., CLERK

No. _____

# IN THE SUPREME COURT OF THE UNITED STATES

**October Term 1979**

No. 79-898

JOHN D. EDGAR and JOYCE EDGAR,
husband and wife,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

WILLIAM J. POWELL
BRYAN P. HARNETIAUX
SHEILA A. MALLOY, Associate
1016 Washington Trust Financial Ctr.
Spokane, Washington 99204
(509) 624-5196
Attorneys for Petitioners

December 11, 1979

No. _____

# IN THE SUPREME COURT OF THE UNITED STATES

**October Term 1979**

---

No. _____

---

JOHN D. EDGAR and JOYCE EDGAR,
husband and wife,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

---

WILLIAM J. POWELL
BRYAN P. HARNETIAUX
SHEILA A. MALLOY, Associate
1016 Washington Trust Financial Ctr.
Spokane, Washington 99204
(509) 624-5196
Attorneys for Petitioners

December 11, 1979

TABLE OF CONTENTS


Page

Opinion Below ..... 1

Jurisdiction ..... 1

Questions Presented ..... 1-2

Constitutional and Statutory Provisions Involved ..... 2-4

Statement of the Case ..... 4-10

1. Nature of the proceedings ..... 4-5

2. Statement of Facts ..... 5-10

Reasons for Granting the Writ ..... 10-12

Conclusion ..... 12-13

Appendix "A"
Opinion of Washington Supreme Court ..... 14-27

Appendix "B"
Order denying petitioners' motion
for reconsideration ..... 28-29

## TABLE OF CASES


**Chandler v. Dix,**
194 U.S. 590 (1904) ..... 10

**Confederated Tribes of Colville v. State of Washington,**
446 F. Supp. 1339 (E.D. Wash. 1978)..... 10

**Edelman v. Jordan,**
415 U.S. 651 (1974) ..... 11

**Griswold v. Connecticut,**
318 U.S. 479 (1965) ..... 12

**Hutto v. Finney,**
437 U.S. 678 (1978) ..... 10

**Monell v. Dept. of Social Services,**
436 U.S. 658 (1978) ..... 10

**Petty v. Tennessee-Missouri Bridge Comm'n,**
359 U.S. 275 (1959) ..... 10

**Quern v. Jordan,**
U.S. (1979) ..... 10,11


### OTHER


28 U.S.C. 1257(3) ..... 1

42 U.S.C. 1981 ..... 3,4,10

42 U.S.C. 1983 ..... 1,2,4,9-10,11,12

RCW 4.92.090 ..... 3,12

RCW 4.92.150 ..... 3

RCW 4.92.160 ..... 3

RCW 4.92.170 ..... 4

RCW 38.40 ..... 4

RCW 38.40.010 ..... 9

Air Force Manual 35-10, Sec. 1-12(2) ..... 5-6

Article X, Sec. 2, Washington State Constitution ..... 4

The petitioners JOHN D. EDGAR and JOYCE EDGAR respectfully pray that a Writ of Certiorari issue to review the opinion of the Supreme Court of the State of Washington entered in this proceeding on May 24, 1979.

## OPINIONS BELOW

The opinion of the Washington Supreme Court, reported at 92 Wn.2d 217, appears as Appendix "A". The Washington Court's order denying petitioners' motion for reconsideration appears at Appendix "B".

## JURISDICTION

The opinion of the Supreme Court of the State of Washington was entered on May 24, 1979. A timely motion for reconsideration was denied on September 12, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257 (3).

## QUESTIONS PRESENTED

1. Whether the State of Washington, which has statutorily abrogated the doctrine of sovereign immunity, is a "person" within the meaning of 42 U.S.C. Sec. 1983 and subject to an action brought in the courts of the State of Washington, rather than in federal court, for violations of 42 U.S.C. Sec. 1983?

2. Whether the State of Washington may, by reason of its status as supervisor of the Washington Air National



Guard, declare itself immune from suits by guardsmen alleging tortious interference with or denial of federal Constitutional rights?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eleventh Amendment, United States Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment, United States Constitution:

> Section 1...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Civil Rights Act of 1871, 42 U.S.C. Sec. 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Washington law governing actions against the state provides in pertinent part:

RCW 4.92.090 **Tortious conduct of state—Liability for Damages**

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCW 4.92.150 **Compromise and Settlement of Claims by Attorney General**

After commencement of an action in a court of competent jurisdiction upon a claim against the state, or any of its officers or employees arising out of tortious conduct or pursuant to 42 U.S.C. Sec. 1981 et seq., the attorney general...may compromise and settle the same and stipulate for judgment against the state, the affected officer or employee.

RCW 4.92.160 **Payment of Claims and Judgments**

Payment of claims and judgments arising out of tortious conduct or pursuant to 42 U.S.C. Sec. 1981 et seq. shall not be made by any agency or department of the state government with the exception of the budget director, and he shall authorize and direct the payment of the moneys only from the tort claims revolving fund whenever:

...

(2) The clerk of the court has made and forwarded a certified copy of a final judgment in a court of competent jurisdiction and the attorney general certifies that the judgment is final and was entered in an action on a claim arising out of tortious conduct or under and pursuant to 42 U.S.C. 1981 et seq. Payment of a judgment shall be made to the clerk of the court for the benefit of the judgment creditors. Upon receipt of payment, the clerk shall satisfy the judgment against the state.



RCW 4.92.170 **Payments Charged to Agencies and Departments...**

Liability for and payment of claims arising out of tortious conduct or under and pursuant to 42 U.S.C. Sec. 1981 et seq. is declared to be a proper charge as part of the normal cost of operating the various agencies and departments of state government whose operations and activities give rise to the liability and a lawful charge against moneys appropriated or available to such agencies and departments.

## STATEMENT OF THE CASE

**1. Nature of the proceedings:**

Petitioners John D. and Joyce Edgar filed a complaint in the Superior Court for the State of Washington alleging tortious conduct and a violation of constitutional and civil rights on the part of the State of Washington.

The Edgars alleged that their civil rights were violated under color of state law in violation of 42 U.S.C. Sec. 1983 and that the State was liable for the constitutional torts of its employees—officers in the Washington Air National Guard. The state law governing the Washington Air National Guard includes RCW ch. 38.40 and Article X, Sec. 2, of the Washington State Constitution.

The Edgars' complaint was dismissed following the trial court's granting of the State's motion for judgment on the pleadings on the grounds that (1) the State of Washington is not a "person" under 42 U.S.C. Sec. 1983 and (2) the Superior Court lacked jurisdiction over the subject matter of the action because the doctrine of sovereign immunity protected the State from any attempt to impose liability for

the tortious or unconstitutional actions of its militia, the Washington Air National Guard.

Because no evidence was received by the trial court, the Edgars, pursuant to Washington law, presented their appeal to the Washington Supreme Court on a hypothetical statement of facts.

**2. Statement of Facts:**

A summarization of the following hypothetical statement of facts is set forth in the opinion of the Washington Supreme Court, App. "A".

In 1970 John D. Edgar, a captain, began active duty as a member of the Washington Air National Guard. In 1971 he was granted a security clearance so that he could participate in the Guard's Human Reliability Program, a program establishing the requirements and responsibilities for screening, selection and continuous evaluation of personnel who controlled, handled, or had access to nuclear weapons.

In July 1973, Lt. Col. Main, an employee of the Washington Air National Guard, called Edgar into his office and shouted that Edgar's hair did not meet Main's expectations. The grooming standards in effect for members of the Guard were set forth in the **Air Force Manual** 35-10 at section 1-12(2), as follows:

> Hair will be neat, clean, trimmed, and present a groomed appearance. Hair will not touch the ears or the collar except the closely cut hair on the back of the neck. It will present a tapered appearance. Hair in front will be goomed so that it does not fall below the eyebrows and will not protrude below the band of properly worn headgear. In no case will the bulk or length of the hair interfere with the proper wear of any Air Force headgear. The acceptability of a member's hair style will be based upon the criteria in this paragraph and not upon the style in which he chooses to wear his hair.



Between July 1973 and March 1974 Mr. Edgar's hair conformed to the standards set forth in the above-quoted section.

In September 1973, Main and Lt. Col. Christoffersen, an officer with the Washington Air National Guard, informed Edgar that they were not "personally satisfied with (his) haircut" and that if he did not get a haircut similar to their own very short hair, he would be relieved from alert duty in the Human Reliability Program on the basis that he was unreliable.

The regulations governing removal from the program did not authorize the supervisor of any participant in the Human Reliability Program to relieve such participant from all Guard duty, but only from "nuclear weapons duty."

On September 12, 1973, Christoffersen and Main, accompanied by Lt. Col. Seagraves, advisor to the Guard unit at Spokane, called Edgar in from alert duty and told him that he must get a "burr G.I." haircut or turn in his area badge and go home without pay. They further told him that if he did not return with his hair as short as theirs, they would remove him from alert duty status as of that day.

The officers further told Mr. Edgar that their conversations with him were considered to be "classified information" and that if he discussed the matter with anyone—including a lawyer—they would file a security violation against him, subjecting him to court martial.

In an attempt to satisfy his superiors Edgar got a "burr G.I." haircut.

In October 1973, believing that the proper method for reporting alleged improper procedures and/or actions by superiors with respect to haircut violations was to file an Inspector General (I.G.) report, Edgar submitted an I.G. report. One week later Lt. Col. Christoffersen asked Mr. Edgar why he had filed the I.G. report and indicated that it would "cost him" to use such a procedure. Christoffersen then told Edgar that he was "unfit to be a member of the Unit," that he was not to be trusted or relied upon in time of war because of his "backdoor policy of going to the I.G.'s office and filing a report against the supervisors," and that his actions were eventually going to cost him his job and his position.

Following a Guard drill weekend inspection on January 6, 1974, Edgar heard that he was to be cited for a haircut violation. He conferred with his flight commander to ask if he had a haircut discrepancy. Edgar was assured that his hair was within acceptable standards. After the inspection and on Main's recommendation, Edgar was found in violation of the haircut standards.

During the winter of 1973-74, both Mr. and Mrs. Edgar



were repeatedly threatened, while Mr. Edgar was off duty, with Mr. Edgar's expulsion from the Guard if he did not change his attitude on the haircut issue.

On January 11, 1974, Edgar received a letter stating that he was suspended from participating in the Human Reliability Program for thirty days. His supervisor refused to comment on the reason for the suspension and stated that he would make no comment on the reason for the suspension other than that he felt confident that Edgar would be permanently expelled from the Guard within the thirty days. Edgar was later informed by Maj. Waldrop, an officer in his squadron, that the thirty-day suspension was based solely on the fact that he did not have "a G.I. type crewcut" as the supervisors preferred.

On February 5, 1974, Mr. Edgar was ordered to report for a psychiatric examination. They psychiatrist indicated that persons from the Guard had contacted him and had presented slanted overviews of Edgar prior to the examination date. The psychiatrist told Edgar that he wanted Edgar to understand that he would not be a part "of a coercion of individuals set on drumming (Edgar) out of flying duty." The psychiatrist subsequently sent a favorable report to the Guard Unit.

Despite the psychiatrist's report, the Unit supervisors, in March, 1974, extended Edgar's suspension to six months.

The State initially suspended Edgar from the Human Reliability Program under the erroneous impression that it

had the authority and power to reinstate him to the program. This is evidenced by the Guard's issuance to Edgar, in March 1974, of a new security clearance with instructions by the State officers to return to his duties. Shortly thereafter, while Edgar was preparing to rejoin the unit, the same state officers told him that only the federal government, not the State could authorize his reinstatement, and that Edgar would remain "suspended" until such time as he was reinstated pursuant to federal (Air Force) orders. Edgar had duties separate and distinct from those associated with the Human Reliability Program which were also impaired, without authority or justification, when Edgar was initially removed from the Human Reliability Program.

Based on the above facts, Mr. and Mrs. Edgar filed a complaint alleging multiple, and in some instances overlapping and/or inconsistent claims for relief in the State Superior Court for Spokane County. Edgar asked that the State be found liable for the injuries suffered in the way of lost wages, mental and emotional distress which directly resulted from the acts of the State's employees.

Because Washington law makes military officers immune from civil liability for "any act or acts done by them" while on active duty, RCW 38.40.010, the Edgars did not name the individual officers as defendants in this action.

In affirming the trial court's dismissal of the Edgars' complaint, the Washington State Supreme Court determined that the State is not suable under 42 U.S.C.



Sec. 1983 for acts of its agents which subjected the Edgars to deprivation of their civil rights and that the State could not be liable for tortious conduct and constitutional violations inflicted upon Air National Guardsmen because no analogous action could arise under the common law.

## REASONS FOR GRANTING THE WRIT

By statute, Washington State has waived its immunity from certain actions against the State in State courts. RCW ch. 4.92. Actions brought pursuant to the provisions of 42 U.S.C. Sec. 1981, et seq., are included among those actions in which Washington statute provides that the state is a proper defendant.

Petitioners recognize that this waiver does not extend to actions brought in federal court, **Petty v. Tennessee-Missouri Bridge Comm'n,** 359 U.S. 275 (1959); **Chandler v. Dix,** 194 U.S. 590 (1904); **Confederated Tribes of Colville v. State of Washington,** 446 F. Supp. 1339 (E.D. Wash. 1978), but submit that the Washington Supreme Court misconstrued this Court's recent cases with respect to a state's liability in state court for violations of 42 U.S.C. Sec. 1983, in states which have abrogated the doctrine of sovereign immunity.

Between the time that the trial court dismissed the Edgars' complaint and the time that the Washington Supreme Court rendered its opinion in this case, this Court decided the **Monell v. Department of Social Services,** 436 U.S. 658 (1978), **Hutto v. Finney,** 437 U.S. 678 (1978), and **Quern v. Jordan,** U.S. (1979), cases discussing the liability of governmental entities under 42 U.S.C. Sec. 1983.

The Washington court interpreted the **Quern** case's affirmance of **Edelman v. Jordan,** 415 U.S. 651 (1974), to exclude states from the liability imposed by 42 U.S.C. Sec. 1983, even where Eleventh Amendment considerations are not present, and found that the State of Washington was not suable—in either federal or state courts—under 42 U.S.C. Sec. 1983.

The Edgars' case is significant in that it seeks further clarification of this Court's most recent interpretations of 42 U.S.C. Sec. 1983, and asks the Court to determine whether the State of Washington, having abrogated the doctrine of sovereign immunity, may be named as a defendant in a Sec. 1983 action which is brought in state court, where no Eleventh Amendment considerations are present.

The Washington court, in affirming the dismissal of the Edgars' case, also held, under a theory akin to "military immunity," that the Edgars were barred from suing the State for the tortious conduct and constitutional violations of its agents. This decision is in direct conflict with the Supremacy Clause in Article VI of the United States Constitution.

In holding that the common law relationship of master and servant strictly applied to Air National Guardsmen and their employer-state, the Washington court failed to consider the State's involvement as significant. The Washington court found that because the allegations upon which the Edgars' claims were based could not have given rise to an action against an employer at common law they



could not give rise, under RCW 4.92.090, to an action against the State of Washington in the Edgars' case.

Petitioners Edgar recognize that a private employer could not be found liable under the common law for the constitutional torts of itself or its agents, unless state action were determined to be present. Where the state itself is the employer, however, and where its agents are acting pursuant to state law when they violate the federal constitutional rights of a state employee, the state cannot be allowed to deny the injured employee an opportunity to proceed to trial on his federal constitutional claims.

The rights guaranteed by the Constitution of the United States must be enforceable to be effective, regardless of a state's interpretation of its own law. **Griswold v. Connecticut,** 381 U.S. 479 (1965).

The Washington court's refusal to provide the Edgars with an opportunity to prove their allegations of federal constitutional violations is a usurpation by the State of a right guaranteed by the United States and a violation of the Supremacy Clause of the federal constitution.

The effect of the Washington court's decision was to deny the Edgars a remedy for the wrongs to which they were subjected. The Civil Rights Act of 1871, at 42 U.S.C. Sec. 1983, and the Constitution of the United States provide a remedy which the State of Washington has refused to recognize.

## CONCLUSION

On the basis of the foregoing it is respectfully requested

that this Court issue a Writ of Certiorari in this case.

Respectfully submitted,

WILLIAM J. POWELL
BRYAN P. HARNETIAUX
SHEILA A. MALLOY, Associate
1016 Washington Trust Financial Ctr.
Spokane, Washington 99204
**Attorneys for Petitioners**



APPENDIX "A"

# IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN D. EDGAR and JOYCE EDGAR,
husband and wife,

Appellants,

v.

THE STATE OF WASHINGTON,

Respondent.

No. 45921
EN BANC

This is an action for damages which the plaintiffs claim to have suffered in the amount of $100,000, as a result of the plaintiff husband's having been suspended from certain assignments of duty in the Washington Air National Guard (WANG). The Superior Court dismissed the complaint on the defendant's motion for judgment on the pleadings.

The complaint alleged in substance that the plaintiffs had suffered mental distress and humiliation as a result of intimidation, harassment and threats improperly inflicted upon the plaintiff husband (hereafter plaintiff) by his superior officers, and that these officers had used improper disciplinary and penal sanctions against the plaintiff. It alleged that these actions constituted arbitrary and

capricious conduct, outrageous conduct, intentional infliction of emotional distress, invasion of privacy, invasion of civil rights, and a violation of guaranteed state and federal constitutional rights.

Pursuant to **Brown v. MacPherson's, Inc.,** 86 Wn.2d 293, 545 P.2d 13 (1975), wherein we held that a complaint cannot be dismissed upon a motion for judgment on the pleadings if there is any conceivable set of facts which would support it, the plaintiff hypothesizes facts which he asserts he can prove at trial. They can be summarized as follows:

> In 1970 the plaintiff, a captain, began active duty as a WANG officer at Spokane. During his 5 years with the Guard, he also performed other duties. In 1971 he was given a security clearance and allowed to fly "air alert," which involved handling or control over nuclear weapons under a program prescribed by the United States Air Force. The program required screening, selection and continuous evaluation of all personnel, who were required to be physically sound and emotionally stable and to demonstrate good judgment and professional competence. The officer responsible for implementing the program was given the authority and means to immediately remove from nuclear weapons duties any individual whom he suspected of being unreliable. Daily assessment of individuals by their peers and immediate supervisors was directed, and certain criteria were given for determining reliability.
>
> Further provisions, all found in the then current Air Force Manual, declared that failure to qualify for the program or remain qualified should not be used as a ground for punitive action, and the regulations with respect to this program did not authorize a supervisor



> to relieve a participant from all National Guard duty, but only from nuclear weapons duty.
>
> Another section of the manual prescribed acceptable haircuts.
>
> In 1973 the plaintiff's supervisors expressed dissatisfaction with his haircut. Thereafter, in spite of the fact that he had his hair cut to the length prescribed in the manual, and at one time secured a "burr" cut, they continued to harass him because his hair did not conform to their standards. He was reprimanded for consulting a civilian attorney about the matter and for filing a report with the Inspector General. He was threatened with suspension from the air alert program and even possible court martial and dismissal from the Guard. He was accused by his squadron commander of having sent the commander an anonymous "sick" letter which he had not written.
>
> In January 1974, the plaintiff was handed a letter advising him that he was suspended from participation in the nuclear weapons program for 30 days. He was ordered to report for a psychiatric examination upon which he received a favorable report. In spite of this, his suspension was extended to 6 months. But in March 1974, he received from National Guard authorities a new security clearance and instructions to return to his duties. As he was preparing to do so, he received notice that only the federal government could authorize his reinstatement and that his supension would have to remain in effect until he received reinstatement orders from the United States Air Force.
>
> Due to his suspension from the nuclear weapons program and impairment of other duties, the plaintiff's pay was reduced. As a result of the conduct of his superior officers, he and his wife suffered mental and emotional distress.

The plaintiff makes no contention that the actions taken against him and treatment accorded him by his superiors were authorized or condoned by state statutes, policies, regulations, or customs, or that the officers' actions were controlled by state law. Rather his contention is that these acts were contrary to or in excess of the authority conferred on the officers under the federal regulations found in the Air Force Manual. Nevertheless, he contends that because the National Guard is, officially at least, under the control of the State and the federal program is administered by the State, the State should be liable for negligent or intentional acts of the officers who administer that program, when those acts result in harm to other members of the Guard. He further contends that the acts of his superiors were tortious, entitling him to the recovery of general damages for emotional distress.

The Superior Court's dismissal of the action was grounded upon its conclusion (1) that section 1983 of the Civil Rights Act (42 U.S.C. § 1983) does not authorize suits against states, and (2) that RCW 4.92.090, under which the State of Washington has consented to be sued for its tortious conduct, was not intended to authorize damage suits by members of the National Guard for alleged torts of other guardsmen. These are the two statutes upon which the plaintiff relies as authority for bringing the action.

With respect to section 1983, the Superior Court's conclusion was in accord with the decision of the United States Supreme Court in **Quern v. Jordan,** 47 U.S.L.W. 4241 (Mar. 5, 1979). It was there held that the Congress of 1871, in adopting a provision which is now section 1983, did not intend to subject the states to liability under the act,



since such liability would have deprived them of the immunity from suits in federal courts which is provided in the eleventh amendment to the United States Constitution. The plaintiff argues that Congress may nevertheless have intended to permit such suits in state courts. However, he points to no language of the act which would justify such an interpretation. Section 1983 subjects to liability any

> person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws...

The question before the court in **Quern,** as Justice Brennan's dissent quite clearly points out, was whether the word "person" as used in this statute included states. It is the inescapable holding of the court that it did not. That holding affirmed the earlier case of **Edelman v. Jordan,** 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974), and removed any doubt cast upon the question in **Monell v. Department of Social Servs.,** 436 U.S. 658, L. Ed. 2d, S. Ct. (1978), wherein the court had found, reversing prior holdings, that the Congress did not intend to exclude municipal corporations from the coverage of the act.

As these cases reveal, the legislative purpose in enacting section 1983 was to provide a remedy for the crimes committed by the Ku Klux Klan against persons who attempted to exercise their newly acquired right to vote and other civil rights, and persons who aided them in that exercise; and that remedy was to be available where state

laws purported to protect civil rights but were ignored by those charged with the duty of enforcing them. Where state statutes denied civil rights, the courts would declare the acts unconstitutional and restrain their enforcement, a procedure which did not invade Eléventh Amendment immunity. Those for whose protection the statute was designed were thus afforded a remedy against the State, if its legislature enacted unconstitutional laws,[1] and against individuals (and now municipalities) where their acts interferred with the exercise of civil rights.

Inasmuch as the State is not suable under section 1983 for acts of its agents subjecting the plaintiff to deprivation of his civil rights, the remedy for such deprivation, if such there was, must be pursued against those individuals who committed the acts.

The remaining question is whether the plaintiff can maintain this action against the State upon a tort theory, under RCW 4.92.090, which provides:

> The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

In construing this statute, we have said that the official conduct giving rise to liability must be tortious, and it must

[1]**See Ex parte Young,** 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908) (a federal court may enjoin a state to conform its future conduct to the requirements of federal law).



be analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation. **Evangelical United Brethren Church v. State,** 67 Wn.2d 246, 407 P.2d 440 (1965). We have held that the act excludes suits founded on discretionary governmental actions, as such actions are defined by this court. **Mason v. Bitton,** 85 Wn.2d 321, 534 P.2d 1360 (1975). In our disposition of this case, we need not concern ourselves with that exclusion. The question is, Does the plaintiff seek to hold the State liable "to the same extent as if it were a private person or corporation" or does he seek to impose upon it a liability which has no parallel in the private sector? The Superior Court, holding that the internal management of military affairs is an activity which is unique and not comparable to any private activity, based its decision upon **Feres v. United States,** 340 U.S. 135, 95 L. Ed. 152, 71 S. Ct. 153 (1950), which was cited in **Wark v. National Guard,** 87 Wn.2d 864, 557 P.2d 844 (1976).

In **Wark,** we held that RCW 38.40.010-.030 provides the exclusive remedy for National Guardsmen wounded, killed or disabled in the line of duty. In interpreting our statutes, we noted the similarity of RCW 4.92.090 to the federal tort claims procedure act, 28 U.S.C. §§ 2671-2680 (1970), and the fact that the federal government provides a compensation system for members of the military similar to that which is provided in this state for guardsmen. We cited **Feres v. United States, supra,** wherein the United States Supreme Court had held that it was not the intent of Congress to provide an additional remedy for those whose claims were already expressly provided for in another statute.

The high court in **Feres** had also said that the military activities of government are so unique that there is no comparable function in the private sector and thus no common law action in which a private person would be liable under similar circumstances. We did not cite that aspect of the opinion, and expressly found the exploration of the question unnecessary to the decision.

The three plaintiffs in **Feres** based their claims on alleged negligence of military personnel. One represented a soldier who had died in a barracks fire and the other two were victims of medical malpractice in army hospitals. While the Supreme Court observed that, in the usual civilian doctor-patient relationship, there is a liability for malpractice, and that a landlord would be liable to a tenant if an injury occurred as a result of a negligently maintained heating plant, it declared that because there is no aspect of civilian life which is comparable to the miltary, there were no similar circumstances under which a private person would be liable.

In a footnote at page 141, the court drew attention to **Dinsman v. Wilkes,** 53 U.S. (12 How.) 389 (1851), wherein it had said that a soldier may recover damages against his superior officer for a willful and malicious injury inflicted upon him by that officer. This is the general rule stated in 54 Am. Jur. 2d **Military & Civil Defense** § 294 (1971). **And see** Annots., 135 A.L.R. 10, 27 (1941); 158 A.L.R. 1462 (1945). In all of the cases where recovery was permitted, the actions were brought against the officers who committed the acts. And in all of them, the injury was of a kind which would have been compensable had it been inflicted by a private individual.



The Supreme Court in **Feres** did not indicate whether, if the injuries in the cases before it had been intentionally inflicted, it would have taken a different view of the government's liability under the federal tort claims procedure act. However, in a later case, recovery was permitted to an inmate of a federal prison for personal injuries suffered through the negligence of a government employee. The court noted that the federal government is not liable for the intentional torts of its employees, citing 28 U.S.C. § 2680(h).

It appears that at the time **Feres** was decided, the court regarded the internal administration of the military as being beyond the scrutiny of the judiciary. **Reaves v. Ainsworth,** 219 U.S. 296, 55 L. Ed. 225, 31 S. Ct. 230 (1911), was still its definitive pronouncement upon the subject. But 3 years after **Feres** the court decided, in the landmark case of **Burns v. Wilson,** 346 U.S. 137, 97 L. Ed. 1508, 73 S. Ct. 1045 (1953), that basic constitutional guarantees, such as due process, apply to the military. Since that time, there has been a growing body of federal law according to members of the Armed Forces certain limited rights of judicial review of actions seriously affecting their interests. A number of law review articles, written by lawyers in the military, reveal the steady progress of judicial intervention and the growing awareness by the military itself of the importance of affording due process to its members. **See e.g.,** Col. D. Peck, **The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities,** 70 Mil. L. Rev. 1 (1975); Maj. J. Wilkerson, **Administrative Due Process Requirements in the Revocation of On-Post Privileges,** 73 Mil. L. Rev. 107 (1976); Lt. Col. R. Semeta,

**Administrative Discharge of Officers and Airmen,** 17 A.F. L. Rev. 79 (1975); Capt. A. Haessig, **The Soldier's Right to Administrative Due Process: The Right to be Heard,** 63 Mil. L. Rev. 1 (1973). **See also** R. Rivkin, **The Rights of Servicemen** (1972).

If the internal conduct of the military with respect to its personnel is subject to some degree of judicial review, it may well be argued that the government should also be held liable for tortious acts of members of such agencies toward each other. However, it appears that the federal courts continue to adhere to the view that the government is not liable under the federal tort claims procedure act for injuries to servicemen which arise out of or are in the course of activity incident to service. In **Harten v. Coons,** 502 F.2d 1363 (10th Cir. 1974), **cert. denied** 420 U.S. 963 (1975), a serviceman and his wife brought an action under that act seeking to recover $50,000 for necessary costs of raising and maintaining a child, which the wife conceived and bore following a vasectomy operation performed upon the husband by military personnel. This was evidently not an injury contemplated under the federal statute providing compensation for injured servicemen. The 10th Circuit dismissed the action, citing **Feres v. United States, supra. See also** cases cited at 502 F.2d 1365 n.6 (10th Cir. 1974) and **Hass v. United States,** 518 F.2d 1138 (4th Cir. 1975).

We need not decide at this time whether the legislature, in enacting RCW 4.92.090, intended to subject the State to liability for injuries inflicted upon a member of the National Guard by another member of the Guard, which are not compensated under RCW 38.40.030. The statute provides that the State shall be liable "for damages arising



out of its tortious conduct to the same extent as if it were a private person or corporation." It is therefore incumbent upon a person asserting a claim against the State to show that the conduct complained of constitutes a tort which would be actionable if it were done by a private person in a private setting. This the plaintiff here has failed to do. Although he alleges that the conduct complained of constitutes outrage, the intentional infliction of emotional distress upon him and his wife, and the invasion of his privacy, he draws no analogy between the conduct complained of and any conduct of a private individual which would be actionable.

It may be that a person has a right to consult an attorney about his relations with his superiors and that any attempt on their part to dissuade him from doing so by means of threats constitutes a tort. But we are shown no case so holding. Nor are we shown any authority for the proposition that it is tortious for one's superiors to threaten punitive actions if their orders are not followed or to abuse their discretion in the assignment of duties.

Such acts if done by a private employer might conceivably violate contract provisions or some statute enacted for the protection of employees, but no such violation is claimed here. It is the general rule that in the absence of governing statutory or contractual provisions, the right to suspend an employee is absolute. **Yantsin v. Aberdeen,** 54 Wn.2d 787, 345 P.2d 178 (1959); **Halliburton v. Huntington,** 20 Wn. App. 91, 579 P.2d 379 (1978). The gist of the plaintiff's contention is that his superiors abused their discretion. We know of no principle of law which

makes such abuse, in and of itself, tortious.

The wrongs of which the plaintiff complains are of the type for which some redress can be obtained within the military structure,[2] or through a section 1983 suit against the persons who allegedly committed the acts, if indeed those acts denied to the plaintiff his civil rights.

The only remedy provided under state law for a member of the Guard who believes himself wronged by his commanding officer is that of reporting the matter to a superior officer, who is required to forward the complaint to the Governor or Adjutant General. RCW 38.38.852. The section does not expressly require any of these persons to investigate the con int or to provide relief for the complaining guardsman. Federal law affords a more satisfactory remedy. **See** 10 U.S.C. § 1552, providing a procedure for the correction of military records, and the assertion of claims incident thereto.

These procedures are available to guardsmen employed in the federally controlled and financed WANG program. Otherwise, their claims are cognizable by the courts only through the remedies provided by law for judicial review of administrative actions.[3] The extent to which courts will inquire into the factual basis for a given military decision is extremely limited. **See** 70 Mil. L. Rev. 1, 66-67 (1975). As that article and others cited point out, it appears the federal courts will review an alleged violation of a regulation only

[2]It appears from the plaintiff's allegations that his complaint to the Inspector General resulted in some action being taken in his behalf, but that an attempt to reinstate him in the nuclear weapons program was thwarted by federal regulations.



if that regulation was designed for the protection of individuals in the position of the person challenging it.[4]

These limitations are imposed in proper recognition of the courts' lack of experience and expertise in making military judgments. The plaintiff's approach would have us nullify such limitations by permitting him to submit his case to a jury, which would not only be called upon to construe the regulations but also to review the facts to determine whether the plaintiff's superiors were justifed in removing him from alert duty, an undertaking for which a jury's competence is surely no greater than that of a judge.

As we understand the plaintiff, he concedes that his suit is unprecedented but believes that the wrongs allegedly done him are ones for which the courts should create a damage action. However, we are here concerned with a state statute which we are not at liberty to extend beyond

[3]**See Olson v. National Guard,** 160 Mont. 387, 503 P.2d 24 (1972). The Montana Supreme Court in that case refused to take jurisdiction of a suit by an officer of the Air National Guard seeking to have his transfer to the Air Reserve declared invalid, holding that because the regulations involved were those of the United States Air Force, and the statute a federal statute, no state law was involved and jurisdiction lay in the federal courts. In the case before us, we do not reach this question, inasmuch as the plaintiff is not seeking the remedy of judicial review.

[4]Colonel D. Peck, in his article **The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities,** 70 Mil. L. Rev. 1, 78 (1975), concludes that there are four general categories of legal challenges to military administrative actions which are reviewable: lack of jurisdiction of the person, violation of statutory authority, violation of the military agency's own regulation (provided it is intended primarily for the plaintiff's protection and makes that protection mandatory), or violation of the constitution. In no case that has come to our attention have general damages, such as are claimed here, been awarded.

the intent expressed in the act. The statute was not designed to create new causes of action. **LaPlante v. State,** 85 Wn.2d 154, 531 P.2d 299 (1975). As we said in **Evangelical United Brethren Church v. State,** 67 Wn.2d 246, 407 P.2d 440 (1965), the statute does not render the State liable for every harm that may flow from governmental action, but only the harm which is the result of tortious misconduct. Abuse of discretion on the part of a supervisor, or his arbitrary and capricious conduct in the making of duty assignments, do not, insofar as we have been shown, fall into that category.

The judgment is affirmed.



APPENDIX "B"

# THE SUPREME COURT OF WASHINGTON

JOHN D. EDGAR and JOYCE EDGAR,
husband and wife,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

No. 45921
ORDER GRANTING MOTION TO RECALL MANDATE AND DENYING MOTION FOR RECONSIDERATION
(Spokane County No. 226719)

This matter having come on before the Court on appellants' Motion to Recall the Mandate, and the Court having considered the motion and the supporting affidavits of appellants and respondents, and the appellants' Motion for Reconsideration, and counsel for appellants having indicated his intention to seek review of this Court's decision in the United States Supreme Court; Now, therefore, it is hereby

ORDERED:

(1) The Motion to Recall the Mandate, issued on July 2, 1979, is granted, and the Clerk of the Superior Court of Spokane County is directed to return the referenced

mandate to this Court.

(2) The filing of the Motion of Reconsideration as attached to the Motion to Recall the Mandate is authorized, and after due consideration by this Court is denied.

DATED at Olympia, Washington, this 12th day of September, 1979.

**CHARLES T. STAFFORD**
**Acting Chief Justice**